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No. 99-286

In the
# Supreme Court of the United States

FOREST PROPERTIES, INC.,
*Petitioner,*

v.

UNITED STATES,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1. May government deny a Clean Water Act § 404 permit thereby taking a parcel of real property and avoiding the payment of just compensation by claiming that the parcel is not the relevant parcel but rather part of a larger parcel when in fact it was a separate parcel acquired at a different time and by a different method, is under different ownership, is located in a different political jurisdiction, and is subject to an entirely different permit process?

2. May a property purchaser be denied just compensation because of notice of a preexisting governmental permit scheme, especially one that does not indicate the property owner has any reason to believe its permit application would not be granted or that, if not, just compensation would not be paid?

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## INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by the government regulation of private property.

Attorneys for Pacific Legal Foundation have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and have participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years. Pacific Legal Foundation attorneys are also currently representing Mr. Bailey Jones in a petition for certiorari before this Court in *Jones v. City of Berkeley*, Supreme Court Docket No. 98-1774, another case in which an appellate court denied a property owner relief for a regulatory taking. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

Pursuant to Supreme Court Rule 37, written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

## STATEMENT OF THE CASE

Forest Products, Inc. (FPI), acquired an equitable interest in 9.4 acres of property that were suitable for single-family home development. (This equitable interest is a protected property

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

right according to California law.) The land was similar in many respects to property that had already been developed in the area.

The property is in an environmentally significant area. Petitioner's Appendix (App.) at B10. FPI worked hard to make the area--along with an adjacent 54-acre upland parcel--suitable for development. In its final plan, FPI agreed to 25 mitigation measures including avoidance of the rare plants, a scaled-back development proposal, the setting aside of 16 acres of the uplands as "open space" and wetlands mitigation. App. at B10-11.

Although it received the necessary state and local permits, FPI had to obtain a permit from the United States Army Corps of Engineers. The Corps asserted jurisdiction over the wetlands and found that FPI's final proposal would involve the fill of "7 acres of vegetated shallows" and 1.6 acres of wetlands. App. at B16. Because single-family homes are not "water-dependent," and because the Corps found that the property could be put to some unspecified "alternative uses," it denied a permit that was necessary to build the homes. App. at B15-17. In other words, building single-family homes in a wetland is out of the question.

FPI was able to develop the upland property that it owned in fee but not the 9.4-acre parcel. Trial testimony indicated that FPI was unable to make economically viable use of the 9.4 acres, it lost several million dollars, and that its equitable title is worthless. App. at A5-6, B20. FPI sued for a taking. *Id.* at B20.

The trial court found if it had focused on the 9.4-acre parcel in which FPI had only an equitable interest, it "would most likely have proceeded to analyze this case as a *Lucas*-type categorical taking." App. at B35. Instead, it forewent the categorical approach and measured the loss of economically viable use by looking at FPI's total landholdings in the area--the 9.4-acre parcel ***combined*** with the 54-acre parcel. Because FPI was able to make use of the 54-acre parcel, FPI was also able to make enough use of the total 63 acres of land (the 9.4 acres owned as an equitable interest and the 54 acres owned in fee) to obviate a finding of a regulatory taking, categorical or otherwise. App. at B54-55. The

court also found that, at the time FPI purchased its option to buy in 1988,

> the public was clearly on notice that the development of wetland areas was subject to compliance with section 404 of the Clean Water Act. . . . Indeed FPI also had actual knowledge that the lakebottom property was subject to the section 404 permit application.

*Id.* at B47-48. Therefore FPI did not have any "reasonable investment-backed expectation" to develop the property. *See id.* at B50.

The Court of Appeals affirmed. It found that the trial court did not commit "clear error" when it directed its takings analysis at the total 63 acres of land rather than the 9.4-acre parcel for which the permit had been denied. The court also found that FPI should be denied recovery because "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss." App. at A12 (citing *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1995)).

## REASONS FOR GRANTING THE WRIT

### SUMMARY AND INTRODUCTION

Twelve years ago, this Court laid down the law in *Nollan v. California Coastal Commission*, 483 U.S. 825, and *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987), and explained that there was such a thing as a regulatory taking and that money damages would have to be paid in the event that a government agency takes property through regulation. But this Court has left it to the lower courts to define when a taking has actually occurred. The lower courts have failed to reach any consensus. Some landowners get fairly compensated; most do not. Some courts have enunciated clear standards; most have not. This case presents an opportunity for this Court to clarify two of the more bedeviling questions in takings jurisprudence. First, what happens when a landowner

faces something less than a total wipeout of his property holdings? And second, what difference does it make to a government's ability to obtain property without paying just compensation if the landowner knew of a regulatory regime before acquiring the property? This amicus brief will explain that this Court should grant FPI's Petition for Writ of Certiorari (Petition) in order to put an end to the confusion among the lower courts and to ensure that the Constitution's promise that property shall not be taken for public use without the payment of just compensation becomes something more than a hollow promise.

## I

## WHEN GOVERNMENT TAKES PRIVATE PROPERTY FOR A PUBLIC USE, IT OUGHT TO PAY JUST COMPENSATION, EVEN IF THE OWNER OWNS OR OWNED OTHER PROPERTY

### A. A Taking of All Use of a Portion of an Owner's Property Warrants as Much Protection as a Physical Invasion

A taking can occur when a regulation deprives an owner of the "economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). In analyzing what has become known as the "relevant parcel" or the "denominator problem," this Court recognizes that, if a trial court were to examine in a takings analysis ***only*** the discrete segment of property that is affected by a use prohibition, then it is more likely that the court will find a taking. Concomitantly a deprivation of "economically viable use" is less likely to be found if a court were to examine the larger land holdings of a landowner because, so long as the owner can use ***some*** property, the owner has not been deprived of economically viable use of ***all*** of his property. Thus government regulators encourage courts to consider as the "relevant parcel" the entirety of the affected parcel. Some government advocates even suggest that courts should also consider other lots owned by the landowner now or in the past that are adjacent to or in the vicinity of the segment of land actually impacted by the use prohibition.

This Court put the issue this way in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987):

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

*Id.* at 497 (citation omitted).

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), this Court found that, when a regulation prohibiting the construction of a single-family home in a residential neighborhood denied "all economically beneficial or productive use of land," it was a "categorical" taking. In this Court's terminology, a "categorical" taking is one where the denial of all economically viable use is a given and where no countervailing concerns--such as the owner's reasonable expectations or the public interest advanced by the use prohibition--can negate the need to pay just compensation for the taking. But this Court expressly left open the question of whether a denial of all use of a part of a parcel might constitute a regulatory taking. 505 U.S. at 1016 n.7.

Quite naturally, government agencies argue that, the larger the ratio between the total parcel and the area affected by the use prohibition, the less likely it will be that there has been a "categorical" taking of all use. But why should this be? For the only other type of "categorical" takings--physical invasions--this Court has made it plain that ***any*** physical invasion of ***any*** size is a taking that can lead to the compensation requirement.

It is well known that, if government authorizes a "physical invasion" of private property, it is a taking, no matter how small a portion of the property may be affected. In both *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-40

(1982), this Court found that a physical invasion was a per se taking, even though the interest in land affected by the invasion was small (*Kaiser Aetna*) to minuscule (*Loretto*). *Accord Lucas*, 505 U.S. at 1014. And it is black letter law that, if the government takes even a tiny portion of one's property for a public works project, the government must pay just compensation. So why should it be any different if the government destroys the use and value of a portion of property through regulation rather than invasion? Indeed, the distinction between physical invasion, formal condemnation, and regulatory takings was questioned by Justice Brennan in 1981. Dissenting over this Court's refusal to reach the merits in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), Justice Brennan wrote:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property.

*Id.* at 652 (footnote omitted) (Brennan, J., dissenting). In other words, if compensation must be paid when government action results in a physical invasion of property, or if it builds on a discrete segment of property, then why not if through regulation the government converts a segment of private land into a de facto and de jure refuge for wildlife, wetlands, or open space?

Government agencies counter, however, by arguing with some justification that, if ***every*** prohibition on using a portion of a parcel of property were to constitute a taking, then government's ability to control inappropriate land uses would be made more difficult. This tension between the interests of the affected property owners and the need for efficient operation of government has pervaded the case law on regulatory takings. For the simple question of what is the relevant parcel when government prohibits the use of only a discrete segment of land, the lower courts are hopelessly split. The split is even more

pronounced when the question becomes more complicated, as when multiple lots are involved or when some lots have already been sold off. Fortunately, there is a coherent and logical solution to this dilemma that has been suggested by one commentator and which has been adopted by one lower court. With this case, this Court can put an end to the unsatisfying state of conflict in the lower courts and adopt a meaningful standard. This brief will next describe the state of the conflict in the relevant parcel doctrine and then suggest a workable solution.

### B. The Lower Courts Do Not Agree on Whether the Denial of All Use of a Portion of a Single Parcel Is a Compensable Taking

In *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (*Florida Rock I*), the Federal Circuit Court of Appeals was confronted by a single 1,560-acre parcel subject to the Corps of Engineers' restrictions. The landowner argued that all 1,560 acres of its wetland mining property had been taken after a permit to mine 98 acres was denied. 791 F.2d at 895-96, 904-05. The government argued that there was ***no*** taking because the use of only 98 acres had been denied--leaving the "parcel as a whole" largely unaffected by the denial. *Id.* at 904. The Federal Circuit rejected both arguments, holding that (1) it would be unfair to award compensation for the 1,458 acres for which the applicant had no immediate plans, *id.* at 904-05, and (2) the court would focus on the 98 acres to see if there had been a taking. *Id.* at 904.

Several years after *Florida Rock I*, the Federal Circuit responded to the government's new argument that the takings denominator should include more than the mineral rights and surface resources needed for mining. The court disagreed:

> By taking some portion of Florida Rock's economic use of the property--its power to disturb the overlying wetlands, and with it the common law property right to mine its subsurface minerals--the Government

> appears to have destroyed part of the value of Florida Rock's holdings.

*Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1572 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995) (*Florida Rock IV*). The court said this could be a taking. *Id.* It also noted that in appropriate circumstances a subset of the bundle of rights can be taken through inverse condemnation. *See id.* at 1572 n.32. *See also Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991) (the court rejected the government's suggestion that there was no taking because the coal owner could farm about half of its property.)

The Tenth Circuit in *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995), however, expressly rejected the *Florida Rock IV* holding. *Clajon* involved an attempt to bring a takings challenge to hunting regulations in Wyoming that limited wild game licenses sold to hunters from out-of-state. The plaintiff, who owned a ranch and derived income from out-of-state hunters, complained that this was a taking of a property right in hunting. 70 F.3d at 1577. In ruling against the landowner, the Tenth Circuit expressly rejected the Federal Circuit's language in *Florida Rock IV* that it can be appropriate to focus more narrowly on the property interest actually taken:

> However, we believe that the relevant denominator must be derived from the entire bundle of rights associated with the parcel of land. . . . Thus, we reject the *Florida Rock* approach.

*Id.* (citations omitted).

More recently, in *Boise Cascade Corporation v. Board of Forestry*, 935 P.2d 411 (Ore. 1997), a landowner was prohibited from logging 56 acres on a 64-acre tract because of a spotted owl nest. The Oregon Supreme Court held that the landowner could state a claim for a regulatory taking. *Id.* at 415-16. Thus the court segregated the 56 acres of owl habitat from the remaining

8 acres of harvestable timber and considered the timber on the 56 acres to be the relevant parcel.

The lesson from these cases is that some courts have been quite willing to focus on what has actually been taken out of a single parcel. But in the case of *Forest Properties*, the Federal Circuit is in conflict with itself and the Supreme Court of Oregon. And while the Tenth Circuit is in conflict with *Florida Rock*, there is no apparent conflict with *Forest Properties*.

### C. A Few Courts Have Divided a Single Parcel for the Purpose of a Takings Analysis

In *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981), the county placed two contiguous sections of an owner's property into two distinct zoning classifications. First, there was a 48-acre section called Strawberry Spit zoned as "urban open space" with a 5-acre minimum lot size. Another 20-acre section known as "Strawberry Point" was zoned to allow four "multiple residential units" per acre. *Id.* at 367. The owner alleged a taking of Strawberry Point. In response, the county advocated a "single parcel" theory under which both the point and the spit would be considered together in a takings analysis.

The court rejected as inapplicable cases where property was treated as a single unit for takings purposes because in those cases "the entire subject property was covered by a uniform restriction." *Id.* Instead, the court noted that in *Nectow v. Cambridge*, 277 U.S. 183 (1928), this Court "considered the smaller tract separately from the larger tract." *American Savings*, 653 F.2d at 370.

The Ninth Circuit also agreed with dicta in *Fifth Avenue Corp. v. Washington County*, 581 P.2d 50, 60 (Ore. 1978), where "the [Oregon Supreme] court divided the property analytically into two parcels" depending on whether they were zoned as developable or not. *American Savings*, 563 F.2d at 370.

Most significantly, the *American Savings* court concluded by holding that if the appellant can show that

> the Spit and Point have been, or would be, treated separately when its development plans are submitted . . . [then] the Spit must be analyzed as a separate parcel for takings purposes.

*Id.* at 372.[2]

But in *Forest Properties*, although the Corps regulated ***only*** the 9.4 acres of the lake bottom parcel, the court did ***not*** consider it to be a "separate parcel for takings purposes."

**D. Courts Are Divided on How to Treat a Landowner Who Has Already Developed Other Land Near the Land That Is Affected by a Prohibition**

In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), the landowner started off in the 1950's with 250 acres. After some 199 acres had been subdivided and sold off, the owner sought to develop the remaining 51. New Jersey required the owner dedicate 38.5 acres as a wetland preserve in order to get a state permit. When the Corps denied a permit on the remaining 12.5 acres, the owner sued for a taking.

The government argued that the relevant parcel must be the original 250 acres or, in the alternative, the 51 acres. The Federal Circuit had no trouble holding that the 199 acres that were developed and sold before the imposition of the current regulatory environment should not be considered in the denominator.

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[2] *Accord Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990). ("Most importantly, the City has treated Queen's Beach separately for zoning and planning purposes. . . . [U]nder the facts of this case, Queen's Beach is to be considered a separate parcel for the purposes of determining whether there has been a taking. 649 F. Supp. at 947-48.).

*Id.* at 1181. As for the 38.5-acre parcel, the court suggested it would be "ungrateful in the extreme" to count the 38.5 acres in the denominator. *Id.*

Similarly, in *Twain Harte Associates, Ltd. v. County of Tuolumne*, 217 Cal. App. 3d 71 (1990), the county had applied different zoning criteria to different portions of an 8.5-acre parcel. After most of the 8.5-acre parcel had been developed, the county rezoned an undeveloped 1.7-acre plot to open space. In response to a taking allegation, the county argued that there was no economic deprivation and no taking because the "8.5-acre parcel has . . . undoubted monetary benefit" from the past development. *Id.* at 85. The court first noted that "the nature of a particular land use regulation has been recognized as potentially creating separate parcels for 'taking' purposes." *Id.* (citing *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 495-96 (1982); *Nectow*; and *Fifth Avenue).* The court concluded:

> the law does not demand the entire 8.5 acre parcel be treated as a whole in an "as applied" inverse condemnation analysis.

*Id.* at 87.

In contrast to *Twain Harte* and its own decision in *Loveladies*, the Federal Circuit decided in *Forest Properties* to lump 9.4 acres of lake bottom property with an adjoining 53-acre segment of uplands. The court concluded that it was proper to look "to the economic reality of the arrangements, which transcended these legalistic bright lines." App. at A10-11. But the economic reality in *Loveladies* was that the owner was able to develop nearly 200 acres and still receive compensation for the taking of 12.5 acres. The economic reality in *Twain Hart* was that the owner was able to develop 6.8 acres and still receive consideration for the remaining 1.7 acres. The "economic reality" is no different here--except that in contrast to *Twain Hart* and *Loveladies*, the Federal Circuit has included other holdings in the takings denominator.

**E. The Federal Circuit Is One of Several That Is in Conflict with the Logic of This Court in *Lucas***

In *Lucas*, this Court expressly rejected as "extreme" and "unsupportable" the notion advocated by the New York Court of Appeal in *Penn Central Transportation Company v. New York City*, 42 N.Y.2d 324, 333-34, 366 N.E.2d 1271, 1276-77 (1977),

> where the state court examined the diminution in a particular parcel's value . . . in light of total value of the takings claimant's other holdings in the vicinity.

*Lucas*, 505 U.S. at 1016 n.7. Despite the logical incongruity of the idea that owners of lots of property should be treated worse than owners of only a small amount of property, the idea that the ownership of other clearly separate parcels diminishes the impact on a regulated parcel has been adopted by the Federal Circuit in *Forest Properties*.

The Federal Circuit is not the only court to make this error. The Michigan Supreme Court in *K & K Construction Co. v. Department of Natural Resources*, 575 N.W.2d 531 (Mich.), *cert. denied*, 119 S. Ct. 60 (1998), the court combined a 55-acre parcel with two other parcels of 16 and 3.4 acres for purposes of determining whether there was a taking. The court reasoned that the parcels were owned in whole or in part by the same owner of the 55-acre parcel and that there was a unified plan of development. The same reasoning was followed in *Volkema v. Department of Natural Resources*, 542 N.W.2d 282 (Mich. App. 1996), *aff'd*, 42 N.W.2d 282, *cert. denied*, 119 S. Ct. 590 (1998).

The Michigan example was also followed in *Karam v. State of New Jersey Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. 1998), *affirmed by adopting appellate opinion*, 723 A.2d 943 (N.J. 1999), *petition for cert. filed*, 67 U.S.L.W. 3774 (May 20, 1999) (Case No. 98-1866). In *Karam*, the appellate court examined the history of a lot comprised of an upland and wetland unit and found the two portions to be a single unit for a takings analysis.

These cases all follow the logic of the notion that this court rejected in *Lucas*: the more real property one owns, the more the government can take without having to pay for it. Would this Court have countenanced the uncompensated taking of one of David Lucas' lots if he had been allowed to build on his second lot?

### F. The Federal Circuit's Holding in *Forest Properties* Is Inconsistent With Those Courts That Have Adopted the Doctrine of Conceptual Severance

In *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (N.Y. 1989), the New York Court of Appeals addressed a challenge to New York City's law regulating the conversion of single-room occupancy housing. The city had suggested that the property owners could have no claim to a taking or denial of economically viable use after comparing the value of the rights affected by the law with the total "bundle" of the owners' property interests. 542 N.E.2d at 1067. The court did not agree:

> But the permanent abrogation of one of those rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking.

*Id.* The court elaborated by citing with favor

> various comments on the theory of "conceptual severance" [i.e., assessing only the value of the rights taken without regard to its relationship to the value of the whole property].

*Id. Accord Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 398-400, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 115 S. Ct. 1961 (1995) (finding the destruction of a reversionary interest to constitute a regulatory taking).

This Court has also on occasion found a taking when only one strand in the bundle of property rights was affected. In both

*Hodel v. Irving*, 481 U.S. 704 (1987), and *Babbitt v. Youpee*, 519 U.S. 234 (1997), the Court struck down congressional attempts to force the transfer of small fractional interests to the tribes upon an owner's death.

In the case of *Forest Properties*, the court below declined to consider separately (or sever horizontally) the 9.4 acres of wetlands from the separately owned and regulated 54-acre upland parcel. In this case, the "horizontal" severance is much more severe than the conceptual severance that some courts have embraced. The difference in results is illogical.

### G. Toward a Coherent Determination of the Relevant Parcel--the *Machipongo* Example

Much more faithful to the Takings Clause of the Constitution is a model for analyzing the takings denominator that was proposed by a commentator and which has been expressly followed by at least one court. A better way to analyze the takings denominator is to conclude that

> any identifiable segment of land is a parcel for purposes of regulatory taking analysis if prior to regulation it could have been put to at least one economically viable use, independent of the surrounding land segments.

John F. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535, 1557 (1994).

The key language here is "independent of the surrounding land segments." With this qualifier, the specter of governments being forced to pay for setbacks and similar regulatory restrictions is substantially lessened. Under this standard,

> it must be shown that there existed prior to regulation at least one economically viable use for the land, the value of which is derived independently of the immediately surrounding land interests.

*Id.* at 1558. As Fee explains:

> In many situations, an identifiable segment of land may be put to no economically viable use, other than to expand or beautify a building or business operation existing on a neighboring segment of land.

*Id.* at 1559. A restriction on the use of such a segment of land, such as with a typical setback, would not be typically compensable under this "independent of the surrounding land segments" qualifier. The only exception would be if this segment were significant enough that by itself it could be economically useful for a purpose unrelated to the use of the neighboring segment. "Under no circumstances," Fee concludes,

> should an owner of a city lot be compensated for what is in fact a diminution in value of the entire lot by alleging that the buffer zone has been completely taken.

*Id.* at 1559-60.

The test proposed by Fee was adopted by a Pennsylvania appellate court in *Machipongo Land and Coal Co. v. Commonwealth of Pennsylvania*, 719 A.2d 19 (Penn. 1998). In *Machipongo*, the owners of a coal deposit alleged that the designation as "unsuitable for mining" (UFM) of 157 acres, out of a total of 2,037 acres, constituted a taking of at least 1,344,800 tons of coal. Another coal owner alleged that 27 acres of 1,350 acres had been taken by the UFM designation.

The court first rejected the commonwealth's theory that the appropriate bright-line test should be to consider together all "contiguous land under a common owner." The court rejected the test for two reasons: first it was facially unfair to treat owners of larger parcels less favorably for the sole reason that such owners have more property. Second, the court noted that owners who had "sold off" portions of their property would be arbitrarily better off than those owners who had not yet sold off their land.

The court also rejected the approach suggested by the landowners: "defining the property interest by the regulation."

Under that test, virtually any segment of land affected by a prohibitory regulation, such as a setback ordinance, would result in a verdict of a taking. This, the court felt, would not reach a proper balance of the public's interest with the interests of the private property owner.

A third approach rejected by the court was what it called a "multi-faceted approach." This test considers "investment-backed expectations," whether any land had already been sold off or developed, "the dates of acquisition," "the extent to which the test has been treated as a single unit," and "the extent to which the protected land enhances the value of the remaining land." The problem with this approach, the court wrote, is that it "fails to offer either regulators or property owners any certainty as to whether a regulation will result in a taking." 719 A.2d at 27-28.

Instead, the court adopted the "defining the property interest by regulation" test as modified by Fee's suggestion that only segments that are economically viable independent of surrounding segments be considered. It employed the Fee analysis by asking the following questions:

- whether the regulated land had value prior to the regulation;
- whether the regulated land has a separate use from the non-regulated contiguous parcel(s)–i.e., whether it may be profitably used if it is the only parcel; and
- if the regulated land has value separate from the contiguous land, whether all of its economic benefit is gone.

Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. at 28.

If this Court were to grant FPI's Petition, it could put an end to the rampant conflicts in the lower courts by adopting the

workable and fair test that has been utilized by the Pennsylvania court.

## II

## "NOTICE" OF A REGULATION DOES NOT OBVIATE A TAKING

### A. The Government Should Not Be Rewarded With a Windfall Just Because the Owner of Property at the Time a Regulation Is Adopted Is Not the One to Bring an As-Applied Takings Claim

In its decision below, the Federal Circuit held that "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss." App. at A13 (quoting *Creppel v. United States*, 41 F.3d at 632).[3] That certainly is the ***result*** of the court's decision but, when it comes to bringing an as-applied challenge to a regulatory program, the real question is ***why*** should ***any*** landowner bear this "risk of economic loss." It is, after all, the government that has created the restraint, not the landowner at the time the regulation was adopted and not the purchaser of the property who brings an as-applied challenge. The end result of the Federal Circuit's rule is that the government is getting something for nothing.[4]

Suppose that a government regulation establishes a permit process for the use of real property--the use of which would not

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[3] A similar result was reached by the Federal Circuit in *Good v. United States*, 1999 WL 673336 (Fed. Cir. Aug. 31, 1999) (Case No. 97-5138), finding that owner has no reasonable investment-backed expectations to develop heavily regulated property which he bought in 1973 because the owner was "not oblivious" to the trend of ever-increasing environmental regulation that resulted in statutes being adopted after the purchase.

[4] If it were not for the court's error regarding the relevant parcel, this would have been a categorical taking. App. at B35. The relevancy of expectations in the context of a categorical taking is questionable after this Court's decision in *Lucas*. *See Lucas*, 505 U.S. at 1015.

be considered a nuisance or otherwise barred by background principles of a law. The regulation falls short, on its face, of denying all use and value of a parcel of real property. Is that a taking? Of course not. This Court has found that the mere passage of a discretionary permitting requirement does not, without more, constitute a taking. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) ("the mere assertion of regulatory jurisdiction . . . does not constitute a regulatory taking").[5]

In many instances the owner at the time the regulation is adopted may be able to file one or more applications to use the property--only to have each application unequivocally denied. But in other instances an owner may ***not*** be able to ripen a claim through the application process. This is especially true for the owner of a smaller lot, or an owner who is too old or too poor. It may be that such an owner's only recourse is to sell the property.

Suppose further, that the actual application--through the permit process--of this regulation prohibits all use of the property such that there is no value remaining. Who should bear the cost of the prohibition--the owner at the time the regulation is adopted, the subsequent owner who applied for a permit one or more times, or the government that denied the permit?

It is true that the subsequent purchaser may have acquired the regulated property at a discount. But so what? The new owner is assuming certain expenses, risks, and transaction costs in pursuing the permit process and takings claim. The question here is not whether any just compensation damages are fairly allocated between the original owner and the subsequent purchaser, but

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[5] This Court has also made it quite plain that courts should not hear an as-applied takings claim unless and until the owner has availed himself of the appropriate permitting procedures. Until that happens, the claim is simply not ripe. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-94 (1985) (describing need to obtain "final decision" from administrative agency).

whether the government will have to pay any damages at all to anyone at all. Under the Federal Circuit's rule, the answer is no. Because the owner at the time the regulatory scheme was adopted was not the same person who made the permit applications, the government gets the benefits of a regulatory taking with none of the costs.[6]

### B. The Federal Circuit Contradicts This Court's Holding in *Lucas*

In a recently published article, Professor Steven J. Eagle is highly critical of the notion that just compensation is not available when the application of a regulation takes private property just because the owner purchased the land subject to an existing regulatory scheme. *See* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. Sch. L. Rev. 345, 376 (1998). One of Professor Eagle's principal criticisms is that this doctrine artfully rewrites this Court's holding in *Lucas*.

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[6] As with so many other areas of takings law, the courts below are in substantial conflict on how to resolve the issue of who should pay when a subsequent owner of real property brings an as-applied takings challenge. *See, e.g., Karam v. State of New Jersey*, *supra* ("the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge"); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994) (an "as applied" but not a "facial" takings challenge can be brought by a purchaser of regulated property); *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, 1229, *rev. denied*, 613 So. 2d 3 (Fla. 1992) ("no taking occurred until DER denied Vatalaro's permit application and determined the property was suitable only for limited passive recreational use"); *see also Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *affirmed*, __ S. Ct. __ (1999) (takings claims proceeds despite the fact that land was purchased with knowledge of permitting requirements). FPI's Petition cites to several cases that are contrary to these. See Petition at 24-24.

Focusing on several holdings from New York that reach the same conclusion as the Federal Circuit, Eagle suggests that the idea that the right to bring an inverse condemnation claim against the application of a regulation must be transferable with the property. Otherwise, the court

> converts an important component of the fee simple--the right to use one's land--into a personal right that has to be exercised during life or else vanishes.

*Id.* at 368. The impact of such a rule is especially apparent when the prior owner was a decedent who "'through infirmity or other reason, could not challenge a confiscatory regulation prior to the decedent's death.'" *Id.* This conversion of the fee simple into something else contradicts this Court's admonition in *Lucas* that

> the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.

505 U.S. at 1014.

## CONCLUSION

To resolve the conflicts among the lower courts, and to ensure that property owners are not deprived of just compensation when they suffer regulatory takings, this Court should grant FPI's Petition for Writ of Certiorari.

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